In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 8364

NG FOOK,

Appellant,

vs.

MARIE A. PROCTOR, United States Commissioner of Immigration at the Port of Seattle,

Appellee.

Reply Brief of Appellant

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STATEMENT OF THE CASE

As the counsel for the appellee have multiplied, the original question in this case has been lost. It started out as a clean-cut question of law. The reason why the appellant was denied admission as the son of a citizen was, of course, that both the citizenship of the father and the son were at issue as a matter of law.

The decision of the Board of Review upon appeal from the Board of Special Inquiry, in determining this question, was as follows:

> "As to the citizenship of Ng Ming Yin. (Who is the father of the citizenship applicant.) The record shows that he was admitted as a citizen son of Ng Fun *who was conceded to be a native of Hawaii* on July 25, 1914. In February, 1918, he was issued a citizen's return certificate and readmitted on return from a trip to China in April, 1920. Again in October, 1921, and March, 1928, he was issued citizen's return certificates and readmitted as a citizen in September, 1924, and December, 1931. The ground for the present refusal to recognize Ng Ming Yin as a citizen is that his father Ng Fun while as the record indicates he was born in Hawaii in 1885 was in China between 1891 and 1899. The theory of the Seattle office appears to be that Ng Fun being in China in 1894 at the time that the Constitutional provision was enacted, of which the wording is 'all persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof,' was not made a citizen by that enactment because being in China he was not then subject to the jurisdiction of the Hawaiian Republic. On this theory the examining officer at Seattle states that 'whether Ng Fun was born in Hawaii is immaterial.' The Board of Review does not agree with the position taken by the Seattle office but on the contrary regards the Hawaiian nativity of Ng Fun as the material factor in the case and considers that his temporary physical absence in China in the years between 1891 and 1899 did not remove him from the jurisdiction of the Republic of Hawaii in the absence of any showing that he

> nenounced his allegiance to Hawaii. Thus it is not believed that the denial of the citizenship of Ng Ming Yin, the present applicant's alleged father, is warranted by the evidence."

The counsel insists that *Wong Foong vs. United States*, 69 F. (2d) 681 (C.C.A. 9), is controlling here. Again counsel leaves out the important question of fact in his statement, namely, the date of the birth of Wong Foong. He was born in China in 1894, which, of course, was prior to the Annexation Act of 1900, incorporating the laws of the United States with respect to citizenship. It is evident that had the petitioner been born subsequent to the Act of April 30, 1900 (8 U. S. C. A. 4) he would automatically have become a citizen of Hawaii by reason of the fact that at the time the statute provided that persons born abroad of citizens of the United States automatically became citizens of this country. However, the present case presents an entirely different question of fact because the father of Ng Fook, the present applicant, was born in 1902 and by reason of the Annexation Act became a citizen of the United States. This was recognized by the immigration authorities and they on repeated occasions admitted the father so as to bring him within the statute (8 U. S. Code Ann. 8) to the effect that the right of citizenship shall not descend to children whose fathers have never resided in the United States.

Respondent refers to Title 1, Chapter 1, Section 1, of the revised laws of Hawaii, 1925 compilation, which were originally enacted in 1892, to the effect that the common law of England is declared to be the common law of Hawaii, but merely states that the amended portion of the provision, which it is contended by the applicant, is a part of the law of 1902, when the father of applicant was born, has no bearing on the present issue. However, the argument of the appellee as to why it is not applicable is hard to follow.

The appellee cites Article 17 of the Constitution of Hawaii which reads:

> "All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof,"

and takes the position that "subject to the jurisdiction" means actual residence.

The appellee cites the case of *In re Lock Tin Sing*, 21 Fed. 905, and quotes from it to the following effect:

> "They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, with a consequent obligation to obey them when obedience can be rendered; and only those subject by their birth or naturalization are within the terms of the amendment."

Extracting a portion from an opinion, such as appellee has done means nothing. A careful examination of the case, and a reading of the opinion will show that "subject to the jurisdiction" has nothing to do with the question of residence. In this particular case, the question of the citizenship of a person born in the United States of Chinese parents arose, and it was contended by the government that a person so born was not "subject to the jurisdiction" under the Fourteenth Amendment to the Constitution of the United States. In addition to the extraction which is quoted by the appellee, Justice Field said:

> "So profoundly convinced are we of the rights of these people from other countries to change their residence and allegiance, that, as soon as they are naturalized they are deemed entitled, with the native born, to all the protection which the government can extend to them, *wherever they may be, at home or abroad* (Italics ours), and the same right which we accorded to them to become citizens here is accorded to them, as well as to the native born, to transfer their allegiance from our government to that of another state."

Justice Field goes on to state that a person once having acquired citizenship becomes subject to the jurisdiction of the United States, and does not lose it, unless he renounces it. There is no contention in this case that anybody renounced any citizenship

which they may have acquired to the United States. Regarding this, the court continues:

> "So, therefore, if persons born or naturalized in the United States have removed from the country, and renounced in any of the ordinary methods of renunciation their citizenship, they henceforth ceased to be subject to the jurisdiction of the United States."

The next case that counsel cites is that of *Elk vs. Wilkins*, 112 U. S. 94, 102, but a careful reading of this case does not support any such statement that "subject to the jurisdiction" used in any sense means residence. That was a case in which the question of certain Indian tribes came into question by reason of the application of the Fourteenth Amendment to the Constitution, which provides to the effect that all persons born or naturalized in the United States are citizens thereof.

It should be noted in passing that Article XVII of the Constitution of Hawaii follows almost the exact words of the Constitution of the United States.

In the case last cited, involving a member of a hostile tribe of Indians, it was held that the Fourteenth Amendment did not make the members of that certain tribe citizens for the reason that that tribe was hostile and was not subject to the jurisdiction of the United States, *even though said tribe*

was within the territorial limits of the United States.

The court also laid down another exception to the rule that a person may not be subject to the jurisdiction of the court, even though within the territorial limits, as in the case of foreign diplomats and consuls. Thus, the case of *Elk vs. Wlkins* does not sustain the contention of the Board of Special Inquiry that "subject to the jurisdiction" means residence. The case goes further to prove this point, showing that a person may not be "subject to the jurisdiction" even though he may reside within the territorial limits of the country, by reason of belonging to a hostile tribe of Indians who had not submitted to the sovereignty of the United States government.

The appellee then cites the case of *Lem Moon Sing vs. United States*, 158 U. S. 538, 15 Sup. Ct., page 971. In that case the decision does not refer to a citizen of the United States, but to one who is admittedly a Chinese alien, and merely establishes a principle of law governing the rights of Chinese aliens to enter the United States, a principle which is thoroughly established and has no application to the present question, which involves a citizen of the United States.

Counsel further refers to the case of *Wong Kim Ark vs. U. S.*, 169 U. S. 649 (1897). This case also refutes the contention of the common law of England to the effect that children born abroad of a father who is a citizen do not take the nationality of the father. The court, referring to the common law, on page 672 of the decision, says that the United States Constitution refused to establish this rule, and refers to the Constitution and Statutes of the United States, which have abolished this rule. It should be noted that such statutes were in effect at the time of the birth of Ng Ming Yin, father of citizen applicant. In 1902 by Act of Congress, citizens of the Republic of Hawaii were made citizens of the United States. See 8 U. S. C. A., Sec. 3.

The case of *Wong Kim Ark* also established the rule that under the Fourteenth Amendment to the Constitution of the United States, any person within the territorial limits of the United States becomes thereby a citizen, and the case further holds that notwithstanding the laws which make it impossible for a Chinese person to become naturalized, yet a Chinese can become a citizen by being born in the United States.

Thus, the contention of the appellee that neither the father nor the grandfather were ever *de jure* citizens of the United States is without foundation.

Regarding the question of the applicability of the English common law, as explained in the original brief of appellant, regardless of Title 1, Chapter 1, Section 1 of the Revised Laws of Hawaii, 1925 compilation, in any event Section 5 of the Constitution of the Territory of Hawaii, which was enacted in 1900, and which was before the date of the birth of the father of the citizen applicant, conclusively wipes out any contention which can be made that the English common law is applicable to this case, by reason of the fact that under such act the laws of the United States are made a part of the laws of the Territory of Hawaii, including the laws with respect to citizenship.

It seems to me that in view of the fact that the Board of Review decided against the Board of Special Inquiry upon this question and found that the theory of the Board of Special Inquiry was erroneous reversing it as follows:

> "whether Ng Fun (grandfather of citizen applicant (paragraph ours) was born in Hawaii is immaterial. The Board of Review does not agree with the position taken by the Seattle office but on the contrary regards the Hawaiian nativity of Ng Fun as the material factor in the case and considers that his temporary physical absence in China in the years between 1891 and 1899 did not remove him from the jurisdiction of the Republic of Hawaii in the absence of any showing that he renounced his allegiance to

> Hawaii. Thus it is not believed that the denial of the citizenship of Ng Ming Yin, the present applicant's alleged father, is warranted by the evidence."

and that the finding of the Board of Review is binding upon the Board of Special Inquiry, that the matter cannot be argued again either in the District Court or in this Court. The matter having been finally determined so far as the Board of Special Inquiry is concerned by the Board of Review, they are now attempting to try out the same question again.

The appellee quotes from the Constitution of Hawaii, the Act of April 30, 1900, Sec. 4 (8 U. S. C. A. 4):

> "All persons who were citizens of the Republic of Hawaii on August 12, 1898, are declared to be citizens of the United States."

and then proceeds to state the conclusion that the grandfather of the citizen applicant was not a citizen of the Republic of Hawaii and did not derive American citizenship under the Act of April 30, 1900, although the grandfather, Ng Fun, was born there, and there is no dispute about the place of his birth, it being established by a duly authenticated certificate, namely, a birth certificate executed by the Secretary of the Hawaiian Islands, showing that Ng Fun was born in the Hawaiian Islands on August 13, 1885. This is the only evidence in the record touch-

ing this question one way or another. It is a well recognized rule as to hardly require citation that the certified certificate of a public officer as to matters under his jurisdiction and in the province of his office is *prima facie* evidence of the facts therein stated, and is admissable in any court in the land to prove the facts therein stated, and may be introduced in evidence regardless of the fact that the parties have testimonial knowledge of the facts therein stated. Such documents, bearing the seal of the government, are never considered hearsay, but are admissable without the testimony of the parties having knowledge of the facts therein stated. Such documents are the best kind of evidence, and are so recognized by all of the courts of the land, and where a party has in his possession such a certificate of a public official, bearing the seal of said official, it is not necessary to call the party having testimonial knowledge of the facts therein stated to prove said facts to any court, and by so doing the right of cross-examination is not afforded to a party disputing the truth of the facts therein stated. The reason for this rule is that the courts regard such certificate as the highest type and best evidence to prove the facts therein stated, and under such circumstances the right of cross-examination can be dispensed with. See Jones "On Evidence," Section 510, and also Sec-

tion 508 where it is said regarding such certificates as evidence:

> "Such entries are generally made by those who can have no motive to suppress the truth, or to fabricate testimony. Moreover, in many cases they are made in the discharge of duty, pursuant to an oath of office."

With this certified certificate of the birth of Ng Fun in Hawaii in the record, counsel deliberately proceeds to state that:

> "It is certain that Ng Fun, not being a citizen of the Republic of Hawaii, did not derive American citizenship under the Act of April, 1900, and he did not begin to reside in the Territory of Hawaii until May 12, 1899."

It is apparent that this is not a mistake that counsel has inadvertently made as to the residence of Ng Fun in Hawaii, because he was born there in 1885 and resided there until 1891 and he again returned in 1899. He has always been conceded to be a citizen of the United States. Counsel then says that because he has declared that Ng Fun is not a citizen of the United States, his son Ng Ming Yin is not a citizen. The record in this case shows that he was admitted as a citizen son of Ng Fun on July 25, 1914. In February, 1918, he was issued a citizen's return certificate on return from a trip to China. In April, 1920, and again in October, 1921, and March, 1928, he was issued citizen's return certifi-

cates. In September, 1924, and December, 1931, he was also admitted as a citizen.

The sole ground for the refusal to admit the citizen applicant is that his grandfather, Ng Fun, happened to be absent from Hawaii, the place of his birth, between 1891 and 1899.

Counsel then proceeds to cite Section 1109 of the Civil Laws of Hawaii in effect in 1896, although these laws have been amended since annexation, as we have urged in our brief on page 8.

Until the writing of the present brief, the argument has always been that Ng Fun was not even born in the Hawaiian Islands. Counsel then proceeded to argue in the face of the documentary evidence that even though Ng Fun was born in the Hawaiian Islands, that fact was immaterial for the reason that his son Ng Ming Yin was born in China. The relationship has always been conceded of Ng Fun to Ng Ming Yin to Ng Fook, grandfather, father and son. The fact that was not conceded by the Board of Special Inquiry was the citizenship. This case started out as a clean cut question of law, but when the law was decided in favor of the citizen applicant by the Board of Review, they turned around and rejected him on the ground of discrep-

ancies. The Board of Special Inquiry, of course, had before it the witnesses, and the advantage of the sworn testimony from the witness stand. In the opinion of the Board of Special Inquiry there never was a case before them where a clean cut question of law so clearly presented itself without the ordinary discrepancies. There is no question in the mind of anyone connected with the Board of Special Inquiry but that Ng Fook is the son of Ng Ming Yin and that his grandfather is Ng Fun, but the Board of Review grabbed at a straw to deny his birth right to the citizen applicant when it had decided the only question in the case in his favor. No one was more shocked at the decision than the Board of Special Inquiry. They had earnestly considered the question of law and believed they were right, but the shock came to them from the Board of Reviews hanging its decision upon discrepancies in spite of their finding, "The present testimony of the applicant and alleged father, while showing considerable agreement."

The argument in this case is based upon the fact that Ng Ming Yin was never a citizen of the United States, and that his admission as a citizen by the immigration authorities was and is contrary to law, and we have a Board of Special Inquiry writing a brief on the question which has been determined by

the appellate forum, the Board of Review, and insisting the Board of Review made a decision that was erroneous and contrary to law. The reason, of course, is that the Board of Special Inquiry do not feel justified in trying to reject the citizen applicant on any alleged discrepancies, because they know that he is the person that he represents himself to be, so to accomplish their end to reject the citizen they want the Board of Review overruled and their decision declared erroneous. Certainly, it is indeed a precedent to have the lower tribunal try to have the upper tribunal reversed.

The order of the court below should be reversed with directions that a writ issue.

The opening brief of appellant have taken up in detail the points raised by the Board of Review. This Court has recently decided the question here presented in an opinion by Judge Garrecht dated July 20th, 1936, entitled *Wong Gook Chinn, Appellant, vs. Marie A. Proctor, etc., Appellee*, No. 9098, and cited the following cases:

> *Go Lun vs. Nogle, etc.*, 22 F. (2d) 246, 247 (C. C. A. A. 9);
>
> *Ex Parte Jue You On*, 16 F. (2d) 153, 154;
> *Gung You vs. Nagle, etc.*, 34 F. (2d) 848, 853 (C. C. A. 9);

Wong Hai Sing vs. Nagle, 47 F. (2d) 1021, 1022 (C. C. A. 9);

Louie Poy Hok vs. Nagle, etc., 48 F. (2d) 753, 755;

U. S. ex rel. Lee im Toy vs. Day, etc., 45 F. (2d) 206, 207;

Tillinghast, etc., vs. Wong Wing, 33 F. (2d) 290 (C. C. A. 1);

Fong Ton Jen, etc., vs. Tillinghast, 24 F. (2nd) 632, 636 (C. C. A.1)

and also the decision of Judge Wilbur in

Hon Chung vs. Nagle, etc., 41 F. (2d) 126, 129;

Ng Yuk Ming vs. Tillinghast, 28 F. (2d) 547 (C. C. A.1).

The Order of the Court below should be reversed, with directions that a writ issue.

Respectfully submitted,

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